IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 798 of 1988

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAMZANALI MAGANBHAI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR.JOSHI, FOR MR.P.M.THAKKAR for Appellant,
MS.PANDIT, ADDL.PUBLIC PROSECUTOR for Opponent,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 28/06/2007

ORAL JUDGMENT

Present Criminal Appeal is preferred by the appellant under the provisions of Section 374 of the Code of Criminal Procedure 1973, against the judgment

and order of conviction and sentence passed by the learned Special Judge, Court No.6, City Civil and Sessions Judge, Ahmedabad in Special Criminal Case No.36 of 1986, on 25th August, 1988, for violating the breach of Clauses 16 (i) (a), 17 (i) (b), 13 (7) and 21 of the Fertilizer (Control) Order 1957 and thereby committed breach of Sections 3 of the Essential Commodities Act punishable under Section 7 of the Act. The learned trial Judge has sentenced the appellant to undergo simple imprisonment for a period of six months and to pay a fine of Rs.500/-, in default thereof, to undergo simple imprisonment for a period of two months for committing the aforesaid offence.

2. Learned Counsel appearing for the appellant as well as learned A.P.P., for the respondent-State has taken me through the judgment and order of conviction and sentence under challenge, so also, the evidence led during the course of trial. The impugned judgment is challenged on various grounds mentioned in the memo of the appeal and it is submitted on behalf of the accused that the finding recorded by the learned trial Judge is erroneous and many legal technical aspects which were required to be

considered by the learned trial Judge has not been considered. It is further submitted that the judgment and order of conviction is not sustainable in the eye of law and the appeal therefore should be allowed.

2.1 While developing the arguments, learned Counsel for the appellant has taken me through the evidence mainly, the Prosecution Witness No.3-Maganlal Ambalal Patel, who has been examined at Exh.43 and Prosecution Witness No.4-Indrajitsinh Jivansinh Jadeja has been examined at Exh.47. Learned Counsel has also drawn the attention of the Court to one aspect which is at page 123 of the paper-book about the presence of Police Officer at the spot, when the statement of the accused was recorded by the Fertilizer Inspector, which makes the statement of the accused inadmissible piece of evidence in eye of law and the same ought not to have been considered for arriving at any finding against the accused.

3. According to learned A.P.P., this is a case of serious nature. It is alleged that accused was regularly mixing the pure salt in Fertilizer Urea.

Out of different places, at shop No.8, Urea was stored and in the other shops, the alleged bags containing pure salt were stored by the accused and it also emerges from the evidence that on account of certain information this business premises were raided. It is the evidence led by prosecution that samples were drawn as per the law from the polythene bag containing Urea and they were sent for analysis to the authorized laboratory and the result of the Lab Analysis clearly reveals that the percentage of Nitrogen was very less compared to the prescribed standard. She has pointed out to the Court, the finding which is at Exh.16 (Page No.144 of the paper-Book). According to Laboratory Report, the percentage of Nitrogen was found only 37.94 % against the prescribed standard / requirement of 46 %. The learned trial Judge has not erred at all in arriving at the finding of guilt considering certain admissions made by the appellant-accused in the statement recorded by the Responsible Officer. Of course, two Prosecution Witnesses No.1 and 2 have turned hostile but it does not go against the root of the prosecution and therefore the appeal should be dismissed. In response to the query raised by the Court, Ms.Pandit, learned A.P.P., has fairly accepted

that ratio of the decision of this Court (Coram: C.K.Buch, J.) laid down in case of **Udepur Phosphates & Fertilizer Co. Ltd. & One Vs. State of Gujarat** (Criminal Appeal No.309 of 1993 decided on 13/02/2007) can be applied to the facts of the present case so far as technical aspects discussed by this Court is considered. Of course, the facts of that case were materially different then the present one, is the say of Ms.Pandit.

4. In response to the say of learned A.P.P., it is submitted on behalf of the appellant-accused that the laboratory finding cannot be looked into as incriminating evidence because backbone of the argument of the accused is that the authorities while drawing sample has not followed the procedure prescribed in the Fertilizer Control Order. It is settled legal position that method of drawing sample prescribed under the said Control Order is of a mandatory nature and violation of all those condition, would positively prejudice to the case of the appellant-accused, as it is likely to affect the ultimate analysis that may be done by the Laboratory.

5. It is alleged that on 23/10/1984, upon receipt of information, the Odhav Police raided the Godown Nos.8 and 9, owned and occupied by the appellant-accused, situated in Madhuram Park Society for breach of Provisions of Fertilizer Control Order, 1957 and during the raid the sample of Fertilizer Urea was collected from the said Godown and that fertilizer was found substandard. Having considered the judgment under challenge and the evidence read over before the Court, it is not possible for this Court to hold that the order of conviction and sentence passed by the learned trial Judge is sustainable.

6. It is not necessary to discuss the evidence of Prosecution Witnesses No.3 and 4, on whose evidence reliance is placed by learned A.P.P., nor the contents of the laboratory report is required to be produced. Undisputedly, in the present case, the point of determination of percentage of Nitrogen in the sample which was drawn, is the major issue because it was the basic allegation against the accused that he was mixing the salt in Fertilizer Urea and was selling substandard fertilizer to the customers which was in violation of scheme of

Fertilizer Control Order, 1957.

7. In part-B of Schedule-II of Fertilizer Control Order, 1957, the method of analysis of fertilizer is referred to, where a detailed procedure is referred to form Sr. No.1 to 3. Sr. No.3 of the said procedure deals with determination of Nitrogen and relevant methods of analysis. There is nothing on record to show that the procedure as prescribed under Part-II of the Method of Analysis was followed in present case. Neither the Agricultural Inspector has stated in his deposition that the method of analysis of fertilizer in Part-B is followed nor the evidence of the fertilizer analyst is called for. Merely, because a person is authorized by a Government to analyze fertilizer would not put that authority which can be equated with report referred to in Section 293 of the Criminal Procedure Code.

8. In the present case, it is clear that from how many bags the actual sample was drawn. The plain reading of the evidence of Officer, who was examined by the prosecution, gives an impression that practically from all bags some fertilizers were taken out after opening the stitches. At first look, this

version of this evidence looks highly improbable and there is no reason for the Officer to draw the sample, the manner in which it is described. It is also not clear that all the bags containing Fertilizer Urea was manufactured by one single company and they were received under one bill or consignment. It will be difficult for the Court to accept the words of the complainant as gospel truth that these samples were drawn as per procedure prescribed under the law. On the contrary, the complainant and the Officer who remained present, was supposed to depose before the Court in detailed as to how and in which manner the sample was drawn and collected, so also, the sample was made harmonious before putting the same into the containers as contemplated in the Control Order. For the sake of brevity and convenience where there is no detailed description as to method of drawing of sample nor there is evidence as to how the sample was made harmonious, the Court is inclined to reproduce the relevant part of Schedule – II of the Order dealing with the procedure prescribed for drawing of the sample.

PROCEDURE FOR DRAWAL OF SAMPLES OF FERTILISERS

1. General Requirements of sampling:

In drawing sample, the following measures and precautions should be observed:

(a) xxx

(b) The sampling instruments shall be clean and dry when used;

(c) xxx

(d) xxx

(e) The sample should be kept in suitable, clean, dry and air tight glass or screwed hard polythene bottle of about 400 gm. capacity or in a thick gauged polythene bag. This should be put in a cloth bag which may be sealed with the Inspector's seal after putting inside the detailed description as specified in [Form P]. Identifiable details may also be put on the cloth bag like sample No./code No. or any other details which enables its identification;

(f) Each sample bag should be sealed air tight after filling and marked with details of sample. [any type of fertiliser] and the name of Inspector who has collected sample.

2. Sampling from Bagged Material:

(i) Scale of sampling

(a) LOT (FOR MANUFACTURERS).- All bags in a single consignment of the material of the sample grade and type drawn from a single batch of the manufacture shall constitute a lot. If a consignment is declared to consist of different batches of manufacture, all the bags of each

batch shall constitute a separate lot.

In the case of consignment drawn from a continuous process, 2000 bags (or 100 tonnes) of the material shall constitute a lot.

(b) LOT (FOR DEALERS).- The lot is an identifiable quantity of same grade and type of fertiliser stored at an identifiable place subject to a maximum limit of 100 tonnes. The lot shall be identified by the Inspector based on visible appearance of bags, their packing and storage conditions. The stock of less than 100 tonnes with a dealer may also constitute one or more lots, if the material (fertiliser) of different sources and brand is available in such quantities.

(c) xxxxx

The number of bags to be chosen from a lot shall depend upon the size of the lot as follows.

Lot size (Number of bags) (N)-	Number of bags to be selected for sampling (n)
Upto 10	1
11-100	2
101-200	3
201-400	4

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(ii) Sampling from big godowns / high stacking.-
If the procedure given in Para-2(i) (c) is not possible to be adopted, the sample

should be drawn from the randomly selected fertiliser bags from different layers, from top and from all open sides in zig zag fashion.

(iii) Sampling from small godowns.-
All the fertiliser bags of the same grade and type of each manufacturer though received on different dates shall be segregated and properly stacked. All bags of same grade and type of fertiliser manufactured by a particular manufacturing unit may be considered as one lot based on their physical conditions and the sample shall be drawn as per procedure laid down in Paras. 2 (i) (c) and 4.

(iv.) Sampling from the damaged stock.-
a. xxxxxxxxxx
b. xxxxxxxxxx

3. Sampling Probe:

(i) xxxxxxx
(ii)xxxxxxx

4. Drawal of samples from bags:

(i) Drawal of sample and preparation of composite samples. Draw, with an appropriate sampling instrument, (sampling probe) small portions of the material from the selected bags as per procedure in Paras.2(i)(b), 2 (ii), 2 (iii) and 2 (iv) (a). The sampling probe shall be inserted in the bag from one corner to another diagonally and when filled with fertilser, the probe is withdrawn and fertiliser is emptied in a container / or on polythene sheet / or on a clean hard surface and made into one composite sample.

(ii) If, the bags do not permit the use of

sampling probe to empty the contents of the bags on level, clean and hard surface and draw a composite sample by the process of quartering as described under Para.3 (ii) or 5.

(iii) In case of chelated micronutrients and mixtures of micronutrients, the three identical containers of the batch, grade, type and manufacture, shall be selected which shall constitute the composite samples, provided it is not possible to draw a composite sample of the size given under Para.4-A (iii);]

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5. Preparation of composite sample:

If the composite sample collected from the different selected bags is larger than [required weight], its size shall be reduced by method of quartering as detailed below,-

Spread composite sample on a level, clean, hard surface, flatten it out and divide it into four equal parts. Remove any diagonally opposite parts. Mix the two remaining parts together to form a cone, flatten out the cone and repeat the operation of quartering till a composite sample of [required weight] is obtained.

6. Preparation of test sample and reference sample:

(i) The composite sample obtained above shall be spread out on a clean, hard surface and divided into three approximately equal portions [each of the weight as specified in Para.8] Each of these samples shall

constitute the test sample.

(ii) Each test sample shall be immediately transferred to a suitable container as defined under Para.1 (e). The slip with detailed description may be put inside the sample bag. Each bag shall also be properly labelled as mentioned in Para . 1 (f)

(iii) Each test sample container shall then be sealed with the seals of the Inspector. If possible, seal of the manufacturer/dealer or purchaser as the case may be, may also be affixed.

(iv) Out of three samples collected, one sample so sealed shall be sent to the in-charge of the Laboratory notified by the State Government under Cl.29 or Central Fertiliser Quality Control and Training Institute, Faridabad or Regional Fertiliser Control Laboratories at Mumbai, Chennai or Kalyani (Kolkata) for analysis. Another sample shall be given to the manufacturer or importer or dealer or the purchaser, as the case may be. The third sample shall be sent by the Inspector to his next higher authority for keeping in safe custody. Any of the latter two samples may be sent for reference analysis as provided for under sub-clause (2) of Cl.29-B;]

9. It is not a matter of dispute that the person who had drawn the sample was authorized to draw the sample but while drawing the sample it was his statutory duty to comply with the mandatory

provisions and if the Court finds that the method of collecting sample adopted by the concerned Officer, was not the method prescribed under the Rules, then, it would be hazardous to rely on the finding arrived at by the Laboratory.

10. In the present case, the statement of the appellant-accused was required to be recorded by the Director of Agriculture but merely because same has been recorded by one Senior Officer of Department, it would not get automatic weightage, because as per the law, the prosecution is supposed to prove that the statement of the accused was recorded by Prosecution Witness No.3, and same is a voluntary statement and was not recorded under any type of direct or indirect pressure. As referred herein above, it is clear from the evidence that initially information against the accused was received by Odhav Police Control and the Police all through out was present during the alleged search and seizure. It is also in evidence that while recording the statement of the accused, the Police Officials were present, so the statement of the accused would losses its evidentiary value and the prosecution therefore cannot take much help from such statement. Prosecution Witness No.4 has stated

that as in one of the godown, the bags containing pure salt were found. They were large in number and therefore doubt was expressed against the accused that he is mixing salt with the Fertilizer Urea while selling the same to the customers. The Laboratory Report does not speak anything about the presence of salt. It is in evidence that the Department had admitted to serve the accused with notice intimating him that the sample of Fertilizer Urea, which were taken from his godown is found substandard, but the said notice was not served.

11. In the same way, the fertilizers were lying in both godowns. In godown No.9 the bags containing only Fertilizers Urea were found during the raid. However, in godown No.8, some bags containing Fertilizer Urea and some bags containing salt were found. The salt was not being a fertilizer, obviously the sample of salt was not drawn. Even, if the say of Prosecution Witness No.3 is accepted as it is, mainly the paragraph 5 of his deposition, it is not sufficient in the eye of law to link the accused with the crime beyond reasonable doubt. While describing the method that had adopted for drawing of sample of Fertilizer Urea, this important witness, Prosecution

Witness No.3 has stated that the sample was taken from seven to eight bags and three packets were prepared and sealed. Out of three packets, one was given to the appellant-accused, one packet was sent for analysis to the Laboratory and remaining packet was kept with Mr.Jadeja. None of these two important witnesses are sure as to how many bags were containing Fertilizer Urea. One witness has stated that they were about 125 to 150. When the witness says, who is a responsible Government Officer, that samples were drawn from seven to eight bags and the Panchnama speaks that from all the bags some Fertilizer Urea was drawn and three packets of 500 Gms., were prepared and sealed, then how the Officer who has deposed before the Court is believed for the method adopted for drawing of sample, is the question which has not been properly addressed by the learned trial Judge.

12. Panchnama does not speak anything about the usage of any instrument which requires to be used to draw the sample from sealed pack. This instrument has been referred too in the relevant rule as sampling probe. At least one reliable evidence ought to have stated before the trial Court that out of

total bags containing Fertilizer Urea, the bags were selected by random sampling as contemplated under the Rules and from those bags with the help of sampling probe, the sample was drawn and while using that sampling probe it was ascertained that the same is cleaned and safe to use for drawing of sample. It is also mentioned in part stated Rules that how the composite sample can be prepared. None of witness has deposed as to how the sample was made composite. In the same way, there is no evidence on record to show about preparation of test sample and reference sample. When the method of drawing sample has not been satisfactorily proved, the Report of the Laboratory would not help the prosecution. The Court cannot ignore one crucial aspect that Panchas have not supported the case of prosecution and the substratum of the story of the prosecution has remained unproved i.e. allegation as to mixing of salt with the Fertilizer Urea before selling or distributing amongst other farmers. When the prosecution has not proved substratum of the story initially placed against the accused, the accused cannot be linked with the crime.

13. On account of inefficiency of evidence to

link any of the accused with the crime, the Court is of the view that the learned trial Judge has grossly erred in appreciating oral as well as documentary evidence led during the course of trial and has not thought about the point as to the adequacy of the evidence available on record and therefore such conviction would not sustain.

14. In the result, present Criminal Appeal is allowed. The judgment and order of conviction and sentence dated 25th August, 1988 rendered by the learned Special Judge, Court No.6, City Civil and Sessions Judge, Ahmedabad, in Special Criminal Case No.36 of 1986 is hereby quashed and set aside. The appellant is acquitted of all the charges levelled against him for violating the breach of Clauses 16 (i) (a), 17 (i) (b), 13 (7) and 21 of the Fertilizer (Control) Order 1957 and thereby committed breach of Section 3 of the Essential Commodities Act punishable under Section 7 of the Act. Fine, if paid by the appellant, is ordered to be refunded to him on proper identification.

14.1 Bail Bonds executed by the appellant-accused shall stand discharged. Order and Direction

accordingly.

(C.K.BUCH, J.)

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